INDEX

	PAGE
PETITION	1
A—STATEMENT OF THE MATTER INVOLVED	2
I. The Parties and the Nature of the Judgment Sought to be Reviewed	2
II. The Importance of the Matter to the Motor Transportation Industry and to Interstate Commerce	3
III. The Facts	4
B—THE QUESTIONS PRESENTED	9
C—REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT	10
BRIEF IN SUPPORT OF AN APPLICATION FOR A WRIT OF CERTIORARI	13
POINT I—The scope and meaning of the statute and the judgment sought to be reviewed	13
POINT II—The General Business Tax Law of the City of New York and the regulations issued thereunder are unconstitutional as applied to petitioner and to the gross receipts derived from interstate commerce	15
POINT III—The General Business Tax Law of the City of New York is unconstitutional in that it imposes multiple tax burdens	22
POINT IV—The General Business Tax Law of the City of New York is unconstitutional in that it levies an impost or duty on exports and imports	25
POINT V—The General Business Tax Law is unconstitutional in that it denies the equal protection of the laws to the petitioner	26
POINT VI—The tax is a tax on gross income and therefore invalid	28
CONCLUSION	28
APPENDIX A	29

TABLE OF CASES

	PAGE
Adams Manufacturing Co. v. Storen, 304 U. S. 307	24
Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203	21
Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218	21
Best & Co. Inc. v. Maxwell, 311 U. S. 454	24
Case of the State Freight Tax, 15 Wall. (U. S.) 232	17
Central Greyhound Lines v. Mealey, 296 N. Y. 18, 334 U. S. 653	19
Cheney Bros Co. v. Massachusetts, 246 U. S. 147	21
Cudahy Packing Co. v. Minnesota, 246 U. S. 450	18
Dun & Bradstreet, Inc. v. City of New York, 276 N. Y. 198, 11 N. E. 2d 728	27
Fargo v. Michigan, 121 U. S. 230	16
Fisher Blend Station, Inc. v. State Tax Commission, 297 U. S. 650	18
Freeman v. Hewit, 329 U. S. 249	15
Galveston, H. & S. A. Ry. v. Texas, 210 U. S. 217	18
Gwin, White & Price, Inc. v. Henneford, 305 U. S. 434	24
Henderson Bridge Co. v. Kentucky, 166 U. S. 150	17
Joseph, Comptroller v. Carter & Weekes, Stevedoring Co., 330 U. S. 422	15, 19, 21
Leloup v. Port of Mobile, 127 U. S. 640	16
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33	23, 24
McLaughlin v. Spector, 323 U. S. 101	10

PAGE

McLeod v. J. E. Dilworth Co., 322 U. S. 327 24
Maine v. Grand Trunk Ry., 142 U. S. 217 ..... 17, 18
Memphis Natural Gas Co. v. Stone, 335 U. S. 80 15

New Jersey Bell Telephone Co. v. State Board of Texas, 280 U. S. 338 18
New York, Erie & Western R.R. v. Pennsylvania, 158 U. S. 431 17
Northern Securities Co. v. U. S., 193 U. S. 197 16

Ozark Pipe Line Corp. v. Monier, 266 U. S. 555 21

Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326 17
Puget Sound Stevedoring Company v. Tax Commission, 302 U. S. 90 15

Richfield Oil Corporation of New York v. City of Syracuse, 287 N. Y. 234, 39 N. E. (2d) 219 27

Southern Pacific Co. v. Gallagher, 306 U. S. 167 24
Stampers Arrival of Buyers, Inc. v. City of New York, 269 App. Div. 741, 54 N. Y. S. 2nd 706, affd. 296 N. Y. 574 27
Station WBT v. Poulnot, 46 F. (2d) 671 18

Texas Transportation & Terminal Company, Incorporated v. New Orleans, 264 U. S. 150 15

United States Express Co. v. Minnesota, 223 U. S. 335 18
United States Glue Co. v. Oak Creek, 247 U. S. 321 28

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 ..... 18, 23

STATUTES AND AUTHORITIES

PAGE

Administrative Code of the City of New York:
Sections RR 41-1.0 and RR 41-18.0 5
Section RR 41-2.0, subd. a 5
Section RR 41-1.0, par. 3 ..... 5, 29
Section RR 41-2.0, subd. b 5, 29
Sections RR 41-6.0 and RR 41-7.0 ..... 7, 32, 33
Section RR 41-210, subd. a 29
Section RR 41-9.0 ..... 32, 34

Articles of Amendment to the United States Constitution:
Fourteenth Article 7, 8, 26

Business Tax Regulations of April 1, 1939, Art. 238, subd. B 6, 30
May 15, 1943, Arts. 210, 212, 213 ..... 6, 30

Civil Practice Act of the State of New York:
Section 473 ..... 2, 8, 26
Article 35 ..... 8, 26

Comptroller's Regulations:
Articles 212 and 213 6

General Business and Financial Tax Law, Local Law No. 20 of 1938 31

General City Law, Article 2-B, Section 24-A (L. 1941, Ch. 199, as amended) 5, 7

Interstate Commerce Act, Part II 20

Laws of the State of New York, 1934, Ch. 873, as amended 5

PAGE

New York City Utility Tax Law, Title 2 of Chapter 41 of Administrative Code 31

Rules of Civil Practice of the State of New York:
Rule 212 2
Rules 106(2) and 107(2) 2, 26
Rule 106(5) 2

United States Constitution:
Article I, Section 8, Clause 3 ..... 7, 8, 15
Article I, Section 10, Clause 2 ..... 7, 8, 25

Lockhart, State Tax Barriers to Interstate Trade, 53 Harv. L. Rev. 1253 22

Morrison, State Taxation of Interstate Commerce, 36 Ill. Law Rev. 727 23

Powell, Indirect Encroachment on Federal Authority by the Taxing Powers of the State, II, 31 Harv. L. Rev. 572 17

Powell, More Ado About Gross Receipts, Taxes, 60 Harv. L. Rev. 710, 748-749 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

M. & M. TRANSPORTATION COMPANY, suing on its behalf and all other interstate motor carriers operating to, and from and through the City of New York,

Petitioners,

against

CITY OF NEW YORK, LAZARUS JOSEPH, as Comptroller of the City of New York, SPENCER T. YOUNG, as City Treasurer of the City of New York, and JOHN J. FAGAN, as City Collector of the City of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Your petitioner, M. & M. Transportation Company (hereinafter called "petitioner") respectfully prays that a *writ of certiorari* issue to review a decision of the Court of Appeals of the State of New York made on December 20, 1949 * which denied a motion for leave to appeal to that Court, thereby affirming a decision of the Appellate Division of the Supreme Court of the State of New York, First Department, † which affirmed a judgment (16-21) ‡

* Printed on page 43 of the papers on appeal in the Appellate Division of the Supreme Court of the State of New York, First Department.

† Pages 37-39 of papers on appeal.

‡ All references, unless otherwise noted, are to folios in the papers on appeal in the Appellate Division.

of the said Supreme Court, in and for the County of New York, made and entered on the 10th day of November, 1948, in favor of the City of New York, et al. and against this petitioner dismissing the complaint herein (16-21).

In support of its petition, your petitioner respectfully shows to this Honorable Court:

A

Statement of the Matter Involved

I. The Parties and the Nature of the Judgment Sought to be Reviewed.

M. & M. Transportation Company (hereinafter called the "petitioner"), a corporation organized under the laws of the Commonwealth of Massachusetts, is engaged in the business of transporting general commodities in interstate commerce under a Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission (59-60).

The City of New York is a municipal corporation; the individual respondents are officers and officials thereof (60).

The petitioner instituted a declaratory judgment action, under Section 473 of the Civil Practice Act of the State of New York, against respondents to declare void and unconstitutional a tax (hereinafter more fully described) imposed by the City of New York upon the gross receipts of the petitioner's interstate motor transportation business (55-96).

The respondents thereupon moved, pursuant to Rule 212 of the Rules of Civil Practice, to dismiss the complaint upon the ground that there was no present justiciable controversy, and upon the further grounds: (a) that the Court had no jurisdiction of the subject of the action (Rules 106(2) and 107(2) of the Rules of Civil Practice of the State of New York); and (b) that the complaint did not state facts sufficient to constitute a cause of action (Rule 106(5)) (22-27).

The Supreme Court of the State of New York, Special Term, granted the motion in so far as it was based upon Section 212 and denied the motion in all other respects (10-15). A judgment was thereupon entered dismissing the complaint (16-21).

In an opinion accompanying the decision by the Supreme Court, Special Term, dismissing the complaint, it was held first, that the local laws are expressly applicable to the petitioner (103); second, that notwithstanding the contention of the petitioner, constitutional questions were not involved since the challenged tax does not constitute an unreasonable burden on interstate commerce (106); third, that the local laws and regulations issued thereunder provide for an apportionment "calculated prima facie to reach that portion of the gross receipts attributable to activities within the City of New York. * * *" (105-106). The Court concluded that the "attack on the local laws predicated on their impact with the commerce clause is therefore premature. We perceive no basis for the claim that they are repugnant to the due process clause. Accordingly, the motion pursuant to 212 is granted, and is otherwise denied" (106).

The order and the judgment entered thereon dismissing the complaint was unanimously affirmed, without opinion, by the Appellate Division of the Supreme Court, First Department. A motion for leave to appeal to the Court of Appeals was thereafter denied without opinion. *However, the affirmance by the Appellate Division and the action of the Court of Appeals of New York constituted a final determination upon a federal question and upon issues presented under the Federal Constitution.*

II. The Importance of the Matter to the Motor Transportation Industry and to Interstate Commerce.

The imposition of a tax by a municipality upon the gross receipts of a company *engaged exclusively* in interstate commerce not only constitutes an unreasonable and undue burden on interstate commerce, but is calculated, inevitably,

to promote such multiplicity of taxes as to threaten the survival of interstate motor transportation. By the judgment sought to be reviewed here, the motor transportation industry (already disproportionately taxed), is made the potential victim of taxation by thousands of local communities searching for new sources of revenue. Indeed, under the camouflage of a purported apportioned gross receipts tax, the City of New York is levying a discriminatory, confiscatory and unconstitutional tax upon interstate commerce and upon non-taxable capital.

Motor transportation is vital not only to a nationally integrated economy, but to the security of this nation. Gross receipts taxes of the character challenged by petitioner must inexorably undermine, if not destroy, the national motor transportation industry. There is implicit, therefore, in this cause an important inquiry into the power of a municipality or a State to circumvent and subvert the National Transportation Policy declared by the Federal Congress.

And more significantly, this cause presents for resolution crucial questions of intergovernmental tax relationships, the allowable area of state taxation of interstate activities and the limitation upon the power of the Federal Congress over interstate commerce. The assumption by the State of New York, through the City of New York, of power to levy taxes upon the gross receipts of a company engaged exclusively in interstate business is a challenge to the primacy of the Federal Government.

To fully appraise the significance of the questions involved, a brief review of the facts is requisite.

III. The Facts.

Petitioner conducts its interstate motor transportation business under a Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission (60). Its business consists solely of the transportation of general commodities from points without the State of New York to points within the State of New York; from points

within the State of New York to points outside the State of New York; and between points outside the State of New York, but traversing the State of New York (63-65). Petitioner does maintain a terminal in the City of New York (63) which, employed for the purpose of receiving, loading and unloading freight in the course of interstate commerce, is in itself an instrumentality of interstate commerce.

The City of New York seeks to tax a portion of the gross receipts derived for appellant's interstate transportation activities "for the privilege of carrying on or exercising" within the City of New York the business of transporting general commodities as aforedescribed (69).

The general business tax of the City of New York (i.e., the gross receipts tax) is authorized under an enabling statute of the State of New York (166-168). Prior to 1941 the City derived its authority to impose a tax under a general Enabling Act which likewise authorized the exaction by New York City of various excise taxes (Laws of the State of New York, 1934, Ch. 873, as amended). In 1941, the General City Law, Article 2-B, Section 24-a (L. 1941, Ch. 199, as amended) was enacted. Thereafter Article 2-B was incorporated into Title RR, Sections RR 41-1.0, Sections RR 41-18.0 of the Administrative Code of the City of New York (69).

Briefly stated, the general business or gross receipts tax is imposed upon every person engaged in or carrying on in the City of New York any trade, business or profession (Adm. Code RR 41-2.0, subd. a). The tax is based upon the gross receipts received in and by reason of any sale made or service rendered in the City (RR 41-1.0, par. 3).

Prior to July 1, 1938, the City's business tax laws contained neither an allocation formula nor a provision for apportioning gross receipts from interstate commerce. Subsequent to July 1, 1938, a provision for apportioning gross receipts from interstate commerce was incorporated into the law. Administrative Code RR 41-2.0 subdivision b, provides:

"Where a receipt in its entirety cannot be subject to the tax imposed by this title by reason of the provisions of the constitution of the United States or any other provision of law, the comptroller shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable to the doing of business in the city shall be taxed hereunder. The comptroller may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage division of the receipts according to the number of jurisdictions in which it may be taxed, the ration of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer whenever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this subdivision."

Implementing this provision, the Comptroller of the City of New York promulgated regulations setting forth a method of allocating receipts, including a formula for apportioning gross receipts from the interstate operation of transportation facilities within and without the City of New York (Business Tax Regulations of April 1, 1939, Art. 238, subd. B; ibid., May 15, 1943, Arts. 210, 212, 213).

Simply stated, the allocation formula yields a percentage based upon an average of three factors: mileage, wages, and receipts and these factors are applied to gross receipts from interstate commerce.

In addition to the foregoing, Articles 212 and 213 of the Comptroller's Regulations provide that, in no event, shall a percentage of gross receipts subject to the tax, be less than 12½% of the total.

The business tax law (i.e., gross receipts tax) contains procedural provisions governing the determination of tax liability under the law, including assessment, refunds and review. In brief, a determination of the tax due is made by the Comptroller. The determination becomes finally and irrevocably fixed unless the taxpayer applies, within

30 days, for hearing or unless the Comptroller redetermines the tax on his own motion. If taxes are erroneously or unconstitutionally collected, the taxpayer is obliged to proceed by way of an application to the Comptroller for a hearing and demand for refund (Adm. Code Sections RR 41-6.0 and RR 41-7.0). These remedies are declared to be exclusive so that no proceedings may be instituted in any court until the administrative remedies provided in Sections RR 41-6.0 and 41-7.0 have been exhausted (Adm. Code Section RR 41-9.0).

The City of New York contends that no resort may be had to the courts without first submitting the controversy to the Comptroller for determination of the tax (77). Hence, the City contends that although the tax be unconstitutional, the taxpayer must first file a protest with the Comptroller, demand a hearing, participate in the hearing and thereafter challenge the determination of the tax, as well as the legality of the tax, in the courts (87-89).

Petitioner urged and now urges that the general business tax of the City of New York is void because it imposes an unconstitutional tax on interstate commerce and a proscribed levy on imports and exports (75-76, 80, 89-90). The allocation formula contained in the General City Law, Article 2-B, and the regulations issued thereunder, do not convert this illegal levy into a constitutional tax.

Since petitioner does not carry on any local activities in the City or State of New York, there are no apportionable local receipts. In consequence, *the City of New York taxes not the receipts, but the flow of interstate commerce and interstate commerce itself.*

By the order and judgment dismissing the complaint, the petitioner has been deprived of property without due process of law and has been denied its constitutional rights and privileges in violation of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the United States Constitution and the provisions of the Fourteenth Article of the Articles of Amendment to the United States Constitution in that:

(a) It has been denied the right to engage in interstate commerce free of undue and unreasonable burdens imposed by the City of New York, all in violation of Article I, Section 8, Clause 3 of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

(b) The tax assessed by the City of New York upon the petitioner's gross receipts from interstate and foreign commerce constitutes a levy of tax on imports and exports contrary to the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States.

(c) It has been denied the equal protection of the laws of the State of New York insofar as it has been deprived of the right to maintain an action in the courts of the State of New York to adjudge illegal and unconstitutional the general business tax of the City of New York and the regulations issued thereunder. The dismissal of the complaint was arbitrary and capricious.

(d) It has been denied the right to litigate questions of law over the rights and jural relations between the parties as it is entitled under Article 35, Section 473, of the Civil Practice Act of the State of New York, and by the Fourteenth Article of the Articles of Amendment to the United States Constitution.

Since the affirmance by the Appellate Division of the order and judgment of the Supreme Court, the City of New York has assessed an arbitrary tax in the amount of $2985.00 against the petitioner, covering the years 1934 to 1948, during a part of which said period the gross receipts tax of the City of New York contained no allocation or apportionment formula whatever.

The notice of motion and other papers which were filed in the Court of Appeals upon the application for leave to appeal, which stated in detail the questions arising under the Constitution and laws of the United States, are among the papers certified to this Court by the Court of Appeals. This petition is based upon the said papers, as well as the

record of the case which was in the Appellate Division of the Supreme Court of the State of New York, and which was also part of the papers upon which the application to the Court of Appeals for leave to appeal was made, under the rules regulating the practice in the New York courts.

B

The Questions Presented

The questions presented are of fundamental constitutional significance:

(a) Does a tax imposed by a state or municipality thereof upon gross receipts from wholly interstate transactions constitute an unreasonable and unconstitutional burden on interstate commerce and an unconstitutional levy on imports and exports, notwithstanding that the law and the regulations issued thereunder contain an allocation formula pursuant to which such gross receipts are purportedly apportioned?

(b) Does the general business and financial tax law of the City of New York impose a tax directly on interstate commerce and a levy of tax on imports and exports in violation of the Constitution of the United States.

(c) Does the allocation formula contained in the general business and financial tax law of the City of New York and the regulations issued thereunder threaten multiple tax burdens and is it, therefore, void and unconstitutional?

(d) Where a state statute provides a specific administrative procedure and where the statute is attacked as unconstitutional, is a denial of a right to test the constitutionality of the statute in the courts, without exhausing administrative remedies as a condition precedent thereto, a denial of the constitutional right of due process?

(e) Where an action is instituted for a declaratory judgment and the court find that the facts set forth are sufficient to constitute a cause of action, may the State court, on a motion to dismiss, adjudicate issues involving federal constitutional questions without hearing, and is the dismissal of the complaint an abuse of discretion and a deprivation of the equal protection of the laws?

These questions have never been passed upon by this Court in the form in which they are presented here.

C

Reasons Relied Upon for the Allowance of the Writ

In addition to the need to resolve the profound constitutional questions involved here, there is a sound pragmatic reason for the allowance of the writ. If this court declines to allow the writ, petitioner will be obliged to resort to the administrative procedure prescribed in the statute which is challenged as unconstitutional. The petitioner will then be obliged to repeat, step for step, the proceedings heretofore had. Obviously, this cause must ultimately reach this Court and the precise issues which will be presented to this Court at some future time are now before this Court for disposition. In the interest of judicial husbandry, this cause should be reviewed by this Honorable Court now.

There are, too, a variety of proceedings in other state courts involving the constitutionality of taxes substantially like that of the City of New York. In *McLaughlin* v. *Spector*, 323 U. S. 101, the Court remanded a case involving a like tax to the state courts of Connecticut for preliminary determination as to constitutionality under state law, reserving the federal question for subsequent decision. In the case at bar the constitutionality of the general business tax of the City of New York has been upheld by the dismissal of the complaint, the affirmance by the Appellate Division and the Court of Appeals of the State of New

York. The allowance of the writ here will provide a standard by which litigants and State and municipal bodies may be guided in cases involving so grave a matter as the imposition of taxes on interstate carriers.

The issues presented in this case are not confined to the motor transportation industry. Indeed its implications reach out to all business which, in our contemporary heterodox economy, is essentially interstate. Every citizen who finds in the Constitution of the United States a barricade against arbitrary State action, and every person who looks to the Federal Constitution as a guide for lawful activity, is affected by the issues presented here.

This case interrelates fundamental Constitutional questions with the complex web of intergovernmental problems.

A review by this Court and a decision on the questions raised here will make possible, through definition of the rights and obligations of States and citizens engaged in interstate activities, the orderly conduct of interstate commerce.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in the said action and to stand to and abide by such order and direction as this Honorable Court shall deem meet and the circumstances of this case require, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated: New York, March 18, 1950.

JOSEPH ROTWEIN,
Counsel for Petitioner.

HERBERT BURSTEIN,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

M. & M. TRANSPORTATION COMPANY, suing on its behalf and all other interstate motor carriers operating to, and from and through the City of New York,

Petitioners,

against

CITY OF NEW YORK, LAZARUS JOSEPH, as Comptroller of the City of New York, SPENCER T. YOUNG, as City Treasurer of the City of New York, and JOHN J. FAGAN, as City Collector of the City of New York,

Respondents.

BRIEF IN SUPPORT OF AN APPLICATION FOR A WRIT OF CERTIORARI

POINT I

The scope and meaning of the statute and the judgment sought to be reviewed.

The substance of the New York City General Business Tax is summarized in the petition (pp. 5-6). A more detailed statement of the law and applicable regulations is set forth in Appendix "A" of this brief.

The New York courts have held, in this case, that a tax upon interstate receipts does not violate the Constitution of the United States. And this decision upon the constitutional questions thus presented was necessary to a determination of the cause in the New York courts.

The statute under which the City of New York imposes a tax upon the gross receipts of companies engaged in interstate motor transportation is, in effect, *a tax upon interstate commerce itself*. An alleged allocation formula does not save the tax, first, because there are no apportionable local receipts and, second, the tax threatens multiple burdens.

The City of New York defends the tax as an "apportioned" levy upon gross receipts. Apportionment is accomplished by employing as an allocation formula, an average of three factors—mileage, wages and receipts. This formula is applied to gross receipts from interstate commerce so as to determine the portion of those receipts attributable to business done in the City of New York.

It is therefore clear that the tax assumes:

1. That business is done in the State of New York.

2. That the allocation formula fairly apportions gross receipts so as to arrive at the part of the receipts attributable to business done in the City of New York.

3. That the portion of the receipts derived by the use of the allocation formula may be separated from the total receipts and thereby subjected to taxation without violating the Commerce Clause of the Constitution.

4. That a taxpayer engaged in interstate commerce must, perforce, resort to the "exclusive" administrative procedure provided for in the challenged statute in order to test the constitutionality thereof.

POINT II

The General Business Tax Law of the City of New York and the regulations issued thereunder are unconstitutional as applied to petitioner and to the gross receipts derived from interstate commerce.

It is fundamental that the power to regulate interstate commerce is expressly reserved to the Federal Congress under Article 1, Section 8, Clause 3 of the United States Constitution:

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *."

Freedom to engage in interstate commerce is an absolute right guaranteed by the Constitution of the United States and protected against abridgment by the States.

Puget Sound Stevedoring Company v. *Tax Commission,* 302 U. S. 90.
Freeman v. *Hewit,* 329 U. S. 249.
Texas Transportation & Terminal Company, Incorporated v. *New Orleans,* 264 U. S. 150.
Joseph, Comptroller v. *Carter & Weekes Stevedoring Co.,* 330 U. S. 422.
Memphis Natural Gas Co. v. *Stone,* 335 U. S. 80.

That the business of transporting commodities from, to and between various states in the United States and from piers and terminals constitutes interstate and foreign commerce is self-evident. And it is equally plain that neither the State of New York nor the City of New York may constitutionally tax the privilege of doing interstate business by motor vehicle by exacting a percentage of the gross receipts.

In the imposition of the challenged tax, the respondent is not levying a valid tax against the property of an interstate carrier owned or used within the City of New York but, on the contrary, is attempting to "project its authority into other States * * * so as to prevent Congress from asserting the power it possesses under the Constitution over interstate * * * commerce * * *."

Northern Securities Co. v. *U. S.*, 193 U. S. 197.

The tax is plainly and unequivocally that species of tax on interstate commerce which this Court condemned in *Fargo* v. *Michigan*, 121 U. S. 230. In that case, the State of Washington sought to tax Fargo's gross earnings from the rental of cars used by railroad companies in interstate commerce. It is significant that the tax was limited to that part of Fargo's gross receipts attributable to the use of its cars "over any railroad * * * within the * * * this State * * * estimated and prorated according to the mileage of said cars within the State of Michigan" (p. 232).

Notwithstanding that the tax (like the one at bar) was calculated on a mileage basis and the gross receipts were clearly apportioned, this Court declared the tax invalid because it amounted to "a regulation of commerce among the States, the power to make which is withheld from the State" (p. 240).

And this Court has reaffirmed the fundamental doctrine that

> "* * * no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subject of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."
>
> *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648.

A tax on the gross receipts on interstate commerce does not escape constitutional limitations by an artificial for-

mula of apportionment. A tax on receipts from interstate commerce is, indeed, a tax on the transportation itself and, accordingly, an invalid "exaction aimed at the commerce itself".

Philadelphia & Southern Steamship Co. v. *Pennsylvania,* 122 U. S. 326.

See, too:

Case of the State Freight Tax, 15 Wall. (U. S.) 232.

It is not claimed by the respondents that the tax is imposed upon taxable franchises, nor may it be claimed that the gross receipts are an appropriate measure of franchise privileges. The business of interstate motor transportation is not a taxable franchise.

Maine v. *Grand Trunk Ry.,* 142 U. S. 217.

In the *Maine* case, although the Court sustained the tax, the principle of the *Philadelphia & Southern* decision was reaffirmed.

Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the State,* II, 31 Harv. L. Rev. 572.

Henderson Bridge Co. v. *Kentucky,* 166 U. S. 150.

See, too:

New York, Erie & Western R.R. v. *Pennsylvania,* 158 U. S. 431.

Respondents contend that apportionment, *per se,* saves their tax. But this Court has held, again and again, that a State tax on gross receipts from interstate commerce is valid only if apportionment is employed as a measure of an *otherwise valid tax on a taxable franchise* which a State may withhold, or as a tax in lieu of a property tax. If the tax is levied upon the receipts of interstate commerce, ap-

portionment does not convert an unconstitutional exaction into a valid tax.

Maine v. *Grand Trunk Ry.*, supra.
United States Express Co. v. *Minnesota*, 223 U. S. 335.
Cudahy Packing Co. v. *Minnesota*, 246 U. S. 450.
Galveston H. & S. A. Ry. v. *Texas*, 210 U. S. 217.

To label this impost a tax on the privilege of doing business is a spurious disguise for an illegal exaction:

> "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

Galveston, H. & S. A. Ry. v. *Texas*, supra (p. 227).

See, too:

Fisher Blend Station, Inc. v. *State Tax Commission*, 297 U. S. 650.

In *New Jersey Bell Telephone Co.* v. *State Board of Taxes*, 280 U. S. 338, the State of New Jersey imposed a 5% franchise tax upon so much of the gross receipts of utilities as equalled the ratio of length of the lines laid in the streets to the total length of the lines. Again, an apportioned tax was held invalid.

See, too:

Fisher Blend Station, Inc. v. *State Tax Commission*, *supra*, at p. 655.
Station WBT v. *Poulnot*, 46 F. (2d) 671.

If the decision in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, appeared to modify these well-settled

principles, all doubt was resolved in *Joseph, Comptroller* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422. In that case, a gross receipts tax was imposed on the receipts of stevedores. This Court held:

> " 'Certain types of tax • • • plainly call for their condemnation as forbidden regulations. Such are the taxes already noted which • • • impose a levy for the privilege of doing it [interstate commerce] or tax interstate transportation or communication on their gross earnings, or levy an exaction on merchandise in the course of its interstate journey'."
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> • • • • • •
>
> "Stevedoring, we conclude, is essentially a part of commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company" (at p. 433).
>
> "The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause" (pp. 433-4).

The respondents contend that the apportionment and allocation formula saves the tax and meets the constitutional objections enunciated in *Joseph* v. *Carter & Weekes*, supra. The respondents urge here (as they did in the *Carter & Weekes* case) that the tax reaches only local receipts. The incontrovertible fact is, however, that there are no local receipts here which may be taxed.

The fundamental principles enunciated by this Court were, in no wise, vitiated by the decision in *Central Greyhound Lines* v. *Mealey*, 296 N. Y. 18, 334 U. S. 653. This Court plainly held that the mere passage of a motor vehicle through a foreign state does not render foreign that which is domestic commerce. Contrariwise, mere passage through a state does not render intrastate that which is interstate commerce. The motor vehicle operation in that case was essentially and fundamentally intrastate. In the case at bar, the operation is exclusively interstate.

If local activities are completely separable from the interstate transaction, a tax on the local incident may escape constitutional proscription. But in the case at bar there *are no local activities* which give rise to receipts. And *no part of the receipts earned* on the interstate transaction can be apportioned to activities carried on within the City of New York. Actually, *the City of New York is attempting to tax the act of moving the goods in the course of interstate commerce.*

Although a state may tax receipts arising from an activity which occurs either before or after the flow of goods in interstate commerce begins or ceases, as the case may be, a tax cannot be *assessed against the flow of commerce itself,* i.e., along the path of transit.

It cannot be contended that any of the petitioner's interstate receipts arise out of local activities. *Petitioner earned no moneys and derived no receipts for activities within the State of New York.* No part of the petitioner's receipts is "properly attributable to the doing of business in the City" and, accordingly, no part of the receipts may be taxed by the City of New York.

The complaint (the sufficiency of which has been sustained and the truth of the allegations of which are presumed) alleges that no business is done in the City of New York and that no receipts are earned there. The operations of the petitioner are subject exclusively to the provisions of the Interstate Commerce Act, Part II. Under that Act, an interstate commerce carrier cannot collect or recover a portion of the receipts for part of the transportation service. *Receipts are earned only when the interstate transaction is completed.* Clearly, there is no earning of partial receipts for the operations within New York. Failure to deliver merchandise to a destination point outside the State of New York would not entitle the petitioner to any portion of the receipts for the operations conducted within the State of New York or, indeed, for any service short of the complete interstate service.

And there is a sound reason for the rule. First, the transportation is wholly interstate and contemplates a complete transaction from origin to destination. Secondly, all charges collected by an interstate carrier must be assessed pursuant to tariff publications on file with the Interstate Commerce Commission. No part of the receipts can be segregated from the whole of the receipts because the *whole and every part of the receipts is earned only for the completed interstate transaction.*

It is manifest that the claim that apportionment saves the tax is wholly without merit. The word "apportionment" and the phrase "fairly apportioned" mean no more than "apportionment between local and interstate" receipts. Indeed, additional support for this interpretation is discovered in the *Carter & Weekes* case, *supra,* where the tax assailed would not and could not have been saved by apportionment. If the allocation formula were, in fact, applied, then 100 percent of the receipts of the stevedores would have been subject to the tax, since all the receipts arose from unloading and loading activities, within local New York City.

Privilege taxes imposed where the taxpayer is engaged solely in interstate commerce have been uniformly held unconstitutional even though the measure of the tax has been apportioned net income.

Anglo-Chilean Nitrate Sales Corp. v. *Alabama,* 288 U. S. 218.
Alpha Portland Cement Co. v. *Massachusetts,* 268 U. S. 203.
Ozark Pipe Line Corp. v. *Monier,* 266 U. S. 555.
Cheney Bros. Co. v. *Massachusetts,* 246 U. S. 147.

On the whole question of apportionment of gross receipts of interstate carriers it has been said:

"If a distinction were to be drawn between receipts from stevedoring and an apportionment of receipts from transportation, the preference for taxability would be much stronger in the case of the former than

in that of the latter. Hence the immunity of transportation receipts would seem to follow a fortiori from the protection here given to the returns from loading and unloading.

The practical objections to transportation taxes from the standpoint of the carrier are not confined to the danger of defective allocations that may result in overlapping by the varying bases and ratios of different states. Competing lines may be favored if receipts are taxed by one tier of states and not by others. Even a general tax may bear more heavily on one means of transport than on some others. Transportation taxes cannot be shifted to patrons as readily as can taxes on sales. Tax burdens imposed by this or that state must usually be borne by the system and not wholly by traffic traversing the particular state. Even if fares and charges could be raised at will, it would be difficult to adjust them according to the fiscal idiosyncrasies of different states crossed by each particular trip. Fares cannot be raised at will. In many ways state taxation of railway gross receipts would have different consequences from those that would ensue from national taxation."

Powell, *More Ado About Gross Receipts Taxes*, 60 Harv. L. Rev. 710, 748-749.

POINT III

The General Business Tax Law of the City of New York is unconstitutional in that it imposes multiple tax burdens.

It is perfectly plain that if the tax here is sustained, it may be imposed upon the same interstate activity by States other than New York. In effect, the plaintiff would be subjected to the risk of cumulative or multiple tax burdens not borne by local commerce of the same character.

Lockhart, *State Tax Barriers to Interstate Trade*, 53 Harv. L. Rev. 1253.

Morrison, State Taxation of Interstate Commerce, 36 Ill. Law Rev. 727.

McGoldrick v. *Berwind-White Coal Mining Co.,* 309 U. S. 33.

Thus it has been said by this Court:

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."
>
> *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250 (260).

The tax regulations provide (Articles 212, 213) that carriers, such as petitioner, must make an allocation of their gross receipts according to a formula based on three factors, to wit, (1) mileage, (2) wages and salaries and (3) receipts. The formula is designed to establish the percentage of gross receipts derived from interstate transportation services. The regulations further provide that in no event shall the percentage of such gross receipts, subject to the taxes, be less than 12½% of the total receipts. Since it is clear that the formula may yield less than 12½%, a portion of the receipts not attributable to operation in New York may be subject to taxation by the City of New York and again subjected to taxation by another State in which the portion taxed by New York is actually received and earned. Concretely, if a carrier operating between New York, New York and Boston, Massachusetts, receives a total of $100,000 in receipts and if $10,000 were attributed, under the formula, to operations within New York City, the City would arbitrarily levy its tax upon $12,500 even though $2,500 of the receipts were earned for operation

through the State of Connecticut. Now if Connecticut elects to apportion and tax the carrier's receipts and therefore assesses its tax on the $2,500, the identical receipts will be subject by tax by two States.

In an unsuccessful attempt to overcome this compelling defect, the City's regulations include a catch-all provision giving the Comptroller discretion to devise some other method of allocation. However, no specific or well defined standards of any kind are established to guide the exercise of such discretion. Thus the risk of multiplication of taxes by other States can be avoided only through the arbitrary act of the Comptroller.

It is axiomatic that New York has no authority to determine what, how and when, and to what extent other States may tax within their respective boundaries. Actually, the attempt by defendant to apply the allocation formula on receipts from interstate commerce and especially its 12½% minimum, must inevitably subject the interstate commerce to the very species of multiple tax burdens proscribed by the Commerce Clause and condemned by this Court.

Adams Manufacturing Co. v. *Storen,* 304 U. S. 307.
Best & Co. Inc. v. *Maxwell,* 311 U. S. 454.
McLeod v. *J. E. Dilworth Co.,* 322 U. S. 327.
Gwin, White & Price, Inc. v. *Henneford,* 305 U. S. 434.
Southern Pacific Co. v. *Gallagher,* 306 U. S. 167.
McGoldrick v. *Berwind White Coal Mining Co.,* supra.

In the *Gwinn, White & Price* case, supra, this Court said:

> "The present tax • • • thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed".

POINT IV

The General Business Tax Law of the City of New York is unconstitutional in that it levies an impost or duty on exports and imports.

A substantial part of the merchandise which the petitioner transports is received at piers, docks and railroad terminals and, accordingly, a substantial part thereof moves in foreign commerce. Insofar as the tax law of the City of New York attempts to impose a duty upon a portion of the gross receipts derived from such transportation, it is unconstitutional and in violation of Article 1, Section 10, Clause 2 of the Constitution of the United States which provides that:

> "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

It is self-evident that the tax attempted to be imposed on petitioner's gross receipts increases the cost of services performed by petitioner and correspondingly increases the cost of importing and exporting goods. Thus evaluated, the tax is clearly a levy of duties on imports and exports contrary to the provisions of the Constitution of the United States.

POINT V

The General Business Tax Law is unconstitutional in that it denies the equal protection of the laws to the petitioner.

The Fourteenth Article of the Articles of Amendment to the United States Constitution provides that:

> "• • • No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Article 35, Section 473 of the Civil Practice Act of the State of New York prescribes that an action for declaratory judgment may be maintained:

> "in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed • • •".

To bar petitioners from exercising in the Supreme Court rights accorded to others is a denial of the equal protection of the laws in violation of Article 1, Section 11 of the New York State Constitution and the Fourteenth Amendment to the Federal Constitution.

The Special Term of the Supreme Court and the Appellate Division, First Department, held that this action was premature in that an attack on the tax law can be made only after a determination by the Comptroller of taxes due by the petitioner and then only after the petitioner had exhausted the administrative remedies provided in the regulations of the Comptroller. It is significant that the Supreme Court, Special Term, denied the respondents' motion made pursuant to Rules 107(2) and 106(2)(5) of

the Rules of Civil Practice and, therefore, affirmatively found that it had jurisdiction of the subject of the action and that the complaint stated facts sufficient to constitute a cause of action. It is submitted that once having sustained the sufficiency of the complaint, the motion to dismiss the complaint under 212 should not have been granted.

The Court of Appeals of New York has held:

> "An action for a declaratory judgment may be maintained, despite the provisions of a taxing statute which provide that the method of judicial review prescribed therein shall be exclusive, where the jurisdiction of the taxing authorities is challenged on the ground that the statute is unconstitutional or that the statute by its own terms does not apply in a given case. Dun & Bradstreet, Inc. v. City of New York, 276 N. Y. 198, 11 N. E. 2d 728".

Richfield Oil Corporation of New York v. *City of Syracuse*, 287 N. Y. 234, page 239, 39 N. E. (2d) 219.

Stampers Arrival of Buyers, Inc. v. *City of New York*, 269 App. Div. 741, 54 N. Y. S. 2nd 706, affd. 296 N. Y. 574.

Declaratory judgment actions involving the constitutionality of other taxing statutes imposed by the City of New York have been entertained by the Supreme Court of the State of New York. The dismissal of the complaint and the denial of the right of access to the courts deprived petitioner of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

POINT VI

The tax is a tax on gross income and therefore invalid.

The tax is imposed on income whether the operations are profitable or not. Since a company may have gross receipts and suffer loss, the tax is equivalent to a tax on capital or, at very least, unfair and inequitable.

United States Glue Co. v. *Oak Creek*, 247 U. S. 321.

CONCLUSION

It is respectfully submitted that this case presents questions of profound public interest. The serious constitutional questions involved require a complete review by this Honorable Court. A *writ of certiorari* should be granted by this Honorable Court so that a full argument of the constitutional questions raised may be had and a judgment directed by this Court in accordance with its interpretation of the constitutional rights involved.

Dated, New York, March 18, 1950.

Respectfully submitted,

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APPENDIX "A"

Briefly, the general business tax is imposed on every person engaged in or carrying on in the City of New York any trade, business or profession (Administrative Code of the City of New York, RR 41-210, subdivision a). The tax is based on the gross receipts received in or by reason of any sale made or service rendered in the City (ibid., RR 41-1.0, par. 3).

The Administrative Code (RR 41-2.0, subdivision b) provides:

> "Where a receipt in its entirety cannot be subject to the tax imposed by this title by reason of the provisions of the constitution of the United States or any other provision of law, the comptroller shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable to the doing of business in the city shall be taxed hereunder. The comptroller may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipts according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this subdivision."

Acting under this provision, the Comptroller of the City of New York promulgated regulations defining methods of allocating such receipts, including a formula for apportioning receipts for the operation of transportation facilities within and without the City of New York. (See Business Tax Regulations, April 1, 1939, Art. 238, subd. B; *ibid.*, May 15, 1943, Arts. 210, 212, 213.)

The applicable section of the 1939 Regulations reads as follows:

Article 238 subdivision (b):

"If the nature of the business is one where mileage is the determining factor in arriving at the gross receipts from interstate commerce the measure of the tax shall be that part of the gross receipts which the number of miles in the state of New York bears to the total number of miles from which such receipts are derived.

Persons required to make an allocation under this rule include among others:

(a) Trucking companies engaged in transporting goods from New York to any other state and not otherwise taxable as a utility under Local Law No. 22 of 1938;

* * * * * * *

In all of the foregoing included in subdivision B of this article, the gross receipts to be allocated shall be limited to the gross receipts derived from business originating or consummated in the city of New York."

Other portions of the business tax regulations of May 15, 1939, which are pertinent to the allocation of gross receipts from interstate commerce of persons operating transportation facilities are as follows:

"PROVISION FOR ALLOCATION AND APPORTIONMENT OF RECEIPTS

Article 210.—Where a receipt in its entirety cannot be subjected to the tax imposed by the General Business and Financial Tax Law by reason of the Federal Constitution or any other provision of law, the Comptroller is empowered to establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business within the City of New York is included in the measure

of the tax.* The formulae set forth in subsequent articles of these regulations are calculated to effect a fair and proper apportionment of receipts in accordance with the principle of allocation as provided by the General Business and Financial Tax Law.

Whenever the Comptroller shall determine, either upon his own initiative or upon application by the taxpayer, that any of the prescribed allocation formulae works unfairly or inequitably to a particular taxpayer or class of taxpayers, he may provide for a different or other method of allocation with due regard to the nature of the business concerned, mileage, the number of jurisdictions in which the receipts may be taxed, the ratio of the taxpayer's property or assets owned and situated in the City to the taxpayer's total property or assets wherever owned and situated, or any method or methods of allocation other than the ones contained in these regulations, which are calculated to effect a fair and proper apportionment in accordance with the principle of allocation as provided by the General Business and Financial Tax Law.

Operators of Transportation Facilities Not Otherwise Subject to Tax Under the Utility Tax Law

Article 212.—Operators of transportation facilities not otherwise subject to the provisions of the Utility Tax Law† are subject to the General Business and Financial Tax Law. Included in this category, among others, are the following:

(1) Persons transporting property by motor vehicle who are specifically exempt under the Public Service Law of the State of New York from supervision of the State Department of Public Service. This group includes, among others, persons engaged in the trasnportation of property wholly within the City of New York or between the City of New York and municipalities contiguous thereto or within a

* Such provision was included in the General Business and Financial Tax Law with the enactment of Local Law No. 20 of 1938.

† The New York City Utility Tax Law as embodied in Title Q of Chapter 41 of the Administrative Code.

zone commercially a part of the City of New York and who carry shipments only on local bills of lading and without any arrangement with other carriers for a common control or division of charges.

* * * * * *

Persons subject to the provisions of this article who operate transportation facilities both within and without the City of New York, whether in intrastate or interstate commerce, are required to make an allocation of receipts as provided in Article 213. Receipts from the operation of transportation facilities in foreign commerce are not subject to inclusion in the measure of the tax.

ALLOCATION FORMULA FOR APPORTIONING RECEIPTS FROM THE OPERATION OF TRANSPORTATION FACILITIES WITHIN AND WITHOUT THE CITY OF NEW YORK

Article 213.—Persons subject to the provisions of Article 212 who operate transportation facilities both within and without the City of New York, whether in intrastate or interstate commerce, are required to make an allocation of receipts as hereinafter provided. The allocation formula herein set forth is based upon three factors which are calculated to effect a fair and proper apportionment of receipts from the operation of transportation facilities over routes originating within the City of New York and terminating outside the City and/or originating outside the City of New York and terminating within the City to the end that only that part of such receipts which is properly attributable and allocable to the doing of business within the City of New York is included in the measure of the tax."

The apportionment formula was modified by the 1943 Regulations which, in addition to the mileage factor employed in the 1943 Regulations, includes wages and receipts as a measure to application of the tax.

Procedural provisions govern the determination of tax liability, including assessment (Administrative Code, Section RR 41-6.0), refund of taxes (*ibid.*, RR 41-7.0) and exclusive methods for determination and review of tax liability under the business tax law (*ibid.*, RR 41-9.0).

Administrative Code, Section RR 41-6.0 prescribes the following assessment procedure:

"DETERMINATION OF TAX.—If a return required by this title or by title O, by title R, or by articles eight to twelve, inclusive, of title E of chapter forty-one of the code, or by local law number four of nineteen hundred thirty-eight is not filed or if a return when filed is incorrect or insufficient * * * the comptroller shall determine the amount of the tax due from such information as may be obtainable or on the basis of external indices, such as the number of employees of the person concerned, rentals paid by him, his stock on hand and/or other factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days, apply to the comptroller for a hearing on such determination, or unless the comptroller shall of his own motion redetermine such tax. The determination of the comptroller shall be reviewable for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice act if instituted within thirty days after the giving of the notice of such determination. Such proceeding shall not be instituted unless the amount of any tax sought to be reviewed with interest and penalties thereon, if any, shall have first been deposited with the treasurer and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceedings. The comptroller shall notify the treasurer of all final determinations."

"REFUNDS.—In the manner herein provided the treasurer upon the order of the comptroller shall refund any tax, interest or penalty erroneously, illegally or unconstitutionally collected by or paid to him, under protest in writing, stating in detail the ground or grounds of the protest, if application to the comptroller therefor shall be made within one year from the payment thereof. * * * A person shall not be en-

titled to a hearing in connection with such application for a refund if he has already had a hearing or had been given the opportunity of a hearing as provided in section RR 41-6.0 of this title. * * * An application to the comptroller for a refund made as herein provided shall be deemed an application for a revision of any tax, interest or penalty complained of and the comptroller shall receive evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person interested who shall be entitled to maintain a proceeding under article seventy-eight of the civil practice act to review such determination if instituted within thirty days after such determination and an undertaking shall first be filed with the comptroller in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such order be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding."

These two procedures are made the exclusive methods for determining tax liability (Administrative Code, RR 41-9.0) and provide as follows:

"REMEDIES EXCLUSIVE.—The remedies provided by sections RR 41-6.0 and RR 41-7.0 of this title shall be the exclusive remedies available to any person for the review of tax liability imposed by this title or by title O, by title R, or by articles eight to twelve, inclusive, of title E of chapter forty-one of the code, or by local law number four of nineteen hundred thirty-eight; and no determination or proposed determination of tax or determination on an application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any legal or equitable action or proceeding other than a proceeding under article seventy-eight of the civil practice act; provided, however, that a taxpayer may proceed by declaratory judgment if he institutes suit within thirty days after a deficiency assessment is made and pays the amount of the deficiency assessment to the treasurer prior to the institution of such suit and posts a bond for costs as provided in section RR 41-6.0 of this title."

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 692

M. & M. TRANSPORTATION COMPANY, suing on its behalf and all other interstate motor carriers operating to, and from and through the City of New York,

Petitioners,

against

CITY OF NEW YORK, LAZARUS JOSEPH, as Comptroller of the City of New York, SPENCER T. YOUNG, as City Treasurer of the City of New York, and JOHN J. FAGAN, as City Collector of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 14, 1950.

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INDEX

PAGE

POINT I—The petition for certiorari should be denied for want of jurisdiction 1

a. The determination below was based on a non-federal ground 1

b. Assuming that the determination below involved a question under the Federal Constitution, the petitioner failed to exhaust his rights to appeal to the highest court of the State 2

POINT II—The General Business Tax Law, as applied to the petitioner, does not violate the Commerce Clause 5

POINT III—The other constitutional issues raised by the petitioner are without merit 6

TABLE OF CASES

Adam v. Saenger, 303 U. S. 59 (1938) 3

Aero Transit Co. v. Commissioners, 332 U. S. 495 (1947) 5, 6

Anniston Mfg. Co. v. Davis, 301 U. S. 337 (1937) 2

Bogart v. County of Westchester, 295 N. Y. 934, 68 N. E. 2d 36 (1946) 4

Central Greyhound Lines v. Mealey, 334 U. S. 653 (1948) 5

Copperweld Steel Co. v. Industrial Commission, 324 U. S. 780 (1945) 1, 2

Estin v. Estin, 296 N. Y. 828, 72 N. E. 2d 18 (1947) .. 4

Gearon v. Layman, 280 N. Y. 807, 21 N. E. 2d 694 (1939) 4

Gorham Mfg. Co. v. Tax Commission, 266 U. S. 265 (1924) 2

Gorman v. Washington University, 316 U. S. 98 (1942) 2

PAGE

Interstate Pipe Line Co. v. Stone, 337 U. S. 662 (1949) 5

Lynch v. New York, 293 U. S. 52 (1934) 1

Maine v. Grand Trunk Railway Co., 142 U. S. 217 (1891) 5

Matter of Marchant v. Mead-Morrison Mfg. Co., 252 N. Y. 284, 169 N. E. 386 (1929) 3,4

McCoy v. Shaw, 277 U. S. 302 (1928) 2

Mellon Co. v. McCafferty, 239 U. S. 134 (1915) 2

Memphis Natural Gas Co. v. Stone, 335 U. S. 80 (1948) 5

Newman v. Gates, 204 U. S. 89 (1907) 5

Osment v. Pitcairn, 317 U. S. 587 (1942) 2

Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169 (1949) 5

Southern Electric Co. v. Stoddard, 269 U. S. 186 (1925) 4

Southwestern Bell Telephone Co. v. Oklahoma, 303 U. S. 206 (1938) 2

Utley v. St. Petersburg, 292 U. S. 106 (1934) 2

Western Union Telegraph Co. v. Priester, 276 U. S. 252 (1928) 3

STATUTES AND AUTHORITIES

Administrative Code of the City of New York

Section RR41-6.0 2

Section RR41-7.0 2

Civil Practice Act of the State of New York

Article 78 2

Section 588(1) 3

Rules of Civil Practice Act of the State of New York

Rule 212 1,6

Buchsbaum, Appeal as of Right to the New York Court of Appeals on Constitutional Grounds, 24 N. Y. U. Law Quarterly Review 158 4

POINT I

The petition for certiorari should be denied for want of jurisdiction.

a. The determination below was based on a non-federal ground.

(1)

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it appear that a federal question was necessarily decided in determining the cause. *Lynch* v. *New York*, 293 U. S. 52 (1934); *Copperweld Steel Co.* v. *Industrial Commission*, 324 U. S. 780 (1945).

The only opinion in this case was written in the Court of first instance. Despite the fact that the opinion discusses constitutional issues, the determination was based on a non-federal ground. The constitutional discussion was merely preliminary to a determination whether, in the exercise of discretion, this was an appropriate case for the use of the declaratory judgment procedure under the New York law. The motion to dismiss was made on several grounds, including grounds which raised the constitutional issues. The Court, nevertheless, confined its determination to the non-federal ground. It dismissed the complaint pursuant to Rule 212 of the New York Rules of Civil Practice and otherwise denied the motion (fols. 16-20).

Rule 212 reads as follows:

> "**Jurisdiction discretionary.** If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised."

Obviously, the determination, in the exercise of discretion, that the declaratory judgment procedure is inappropriate in a particular case involves no federal question.

(2)

The petitioner has not exhausted its remedies. The tax law which the petitioner is challenging provides an adequite remedy for reviewing the questions raised by it. The petitioner has the right to have a hearing before the Comptroller of the City of New York and, should the latter's determination be adverse, to review the determination in the courts under Article 78 of the New York Civil Practice Act, a proceeding which has taken the place in this State of certiorari and mandamus proceedings. (New York City Administrative Code, §§ RR41-6.0, RR41-7.0, quoted at pp. 33-34 of petitioner's brief.)

The cases hold that, where there has been a failure to resort to such an adequate remedy, a petition for certiorari will be denied. *Mellon Co.* v. *McCafferty,* 239 U. S. 134 (1915); *McCoy* v. *Shaw,* 277 U. S. 302 (1928); *Copperweld Steel Co.* v. *Industrial Commission,* 324 U. S. 780 (1945). Cf. *Gorham Mfg. Co.* v. *Tax Commission,* 266 U. S. 265 (1924); *Utley* v. *St. Petersburg,* 292 U. S. 106 (1934); *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337 (1937); *Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U. S. 206 (1938).

b. Assuming that the determination below involved a question under the Federal Constitution, the petitioner failed to exhaust his rights to appeal to the highest court of the State.

This Court is without jurisdiction to review a decision of a state court which is not the highest court of the state in which a decision could be had. *Gorham* v. *Washington University,* 316 U. S. 98 (1942); *Osment* v. *Pitcairn,* 317 U. S. 587 (1942).

The petitioner seeks "to review a decision of the Court of Appeals of the State of New York made on December

20, 1949 which denied a motion for leave to appeal to that Court, thereby affirming a decision of the Appellate Division of the Supreme Court of the State of New York, First Department" (Petition, p. 1). A denial of leave to appeal by the New York Court of Appeals is no more an affirmance by that Court than is a denial of certiorari by this Court. In *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 169 N. E. 386 (1929) the Court said (pp. 297-298, 169 N. E. at p. 390):

> "A denial of a motion for leave to appeal is not equivalent to an affirmance of the order thus withdrawn from review. It does not give to the order the value of a precedent. Not infrequently relief is refused in the exercise of discretion, for the test in many cases is the promotion of substantial justice (Const. art. VI, § 7, subd. 5; Civ. Prac. Act, § 588, subd. 5). The ruling, too, is summary. Motions for leave to appeal have the careful consideration of all the judges of the court, yet they lack the authority that attaches to a decision with all the aid of argument."

Thus, it is clear that the denial of leave is not in any sense an affirmance. It is true that, where such a denial of leave to appeal precludes an appeal to the highest state court, certiorari may issue to the intermediate court. *Adam* v. *Saenger*, 303 U. S. 59, 61 (1938). In the case at bar, therefore, the writ, if granted, should be directed to the Appellate Division. *Western Union Telegraph Co.* v. *Priester*, 276 U. S. 252, 258 (1928).

The petitioner, however, has not exhausted his rights to appeal to the highest State court, the New York Court of Appeals. The New York Civil Practice Act § 588(1), so far as pertinent, reads as follows:

> **"Appeal as of right.** Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, which action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency; and provided further that

(a) there be directly involved the construction of the constitution of the state or of the United States;"

Hence, if this case directly involves constitutional questions, the petitioner could have appealed to the Court of Appeals as a matter of right. See *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186 (1925); *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. at page 298, 169 N. E. at pages 390-391; BUCHSBAUM, *Appeal as of Right to the New York Court of Appeals on Constitutional Grounds*, 24 N. Y. U. Law Quarterly Review, page 158 (Jan., 1949).

When constitutional questions are directly involved, the Court of Appeals will deny a motion for leave to appeal because an appeal can be taken as of right. Normally, when the Court denies a motion under such circumstances, it indicates that the appeal may be taken as of right. *Gearon* v. *Layman*, 280 N. Y. 807, 21 N. E. 2d 694 (1939); *Bogart* v. *County of Westchester*, 295 N. Y 934, 68 N. E. 2d 36 (1946); *Estin* v. *Estin*, 296 N. Y. 828, 72 N. E. 2d 18 (1947). The absence of such a notation concerning the right to appeal in denying a motion for leave does not preclude an appeal as of right where a constitutional question is directly involved.

The failure of the Court of Appeals to indicate that an appeal could be taken as of right in the case at bar, in all probability, resulted from the fact that the dismissal in the court below was based on the non-constitutional ground that this was an inappropriate case for the use of the declaratory judgment procedure, and, hence, no

constitutional question was directly involved in the determination of the case.

In any event, the petitioner's failure to take an appeal as of right to the Court of Appeals, such an appeal being available to it if a constitutional question were directly involved, prevents it from seeking review in this Court. *Newman* v. *Gates*, 204 U. S. 89 (1907).

POINT II

The General Business Tax Law, as applied to the petitioner, does not violate the commerce clause.

The petitioner carries on business in the City of New York. It maintains a terminal there (fol. 63). It renders services in the City to consignors and consignees, making deliveries and picking up merchandise there (fols. 63-66). It utilizes the City's streets, roads, protection and other services.

The tax is fairly apportioned in accordance with an allocation formula based on the average percentage derived from local mileage, wages and receipts.

The mere fact that one is engaged in interstate commerce does not automatically bar the imposition of local taxation. Such taxes have been upheld where they are non-discriminatory, non-cumulative and are fairly apportioned to the local activity. *Interstate Pipe Line Co.* v. *Stone*, 337 U. S. 662 (1949); *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80 (1948); *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653 (1948); *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217 (1891). See, also, *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949); *Aero Transit Co.* v. *Commissioners*, 332 U. S. 495 (1947).

Aside from the situation where a taxpayer's percentage of activity in New York City under the allocation formula is less than 12½%, there is not the slightest basis for a claim that the tax imposes multiple tax burdens. In the

present state of the record there is no way of determining whether the activity of the petitioner in New York City is so slight as to bring the 12½% minimum tax provision into play. The validity of such a provision should be tested in a case where the challenge is made by a taxpayer affected by it. Minimum tax provisions have been upheld in the past. *Aero Transit Co.* v. *Commissioners*, 332 U. S. 495 (1947).

POINT III

The other constitutional issues raised by the petitioner are without merit.

(1)

The contention that the tax constitutes an impost or duty on exports and imports has no foundation in the record. There is nothing in the record to support the statement that the merchandise which the petitioner transports is received at piers or docks or that it enters foreign commerce. All that the record contains with relation to foreign commerce is a bare allegation that the tax violates Article I, Section 10, Clause 2 of the United States Constitution (fol. 76).

(2)

It is asserted that there has been a denial of the equal protection of the laws in the refusal of relief to the petitioner in the form of a declaratory judgment. Under New York law, the courts are authorized to decline to pronounce a declaratory judgment in the exercise of discretion. (See New York Rule of Civil Practice 212 quoted *supra*, p. 1.) A denial of a discretionary procedure where a full review by the courts is available under other procedures does not constitute a denial of equal protection of the laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

April 14, 1950.

Respectfully submitted,

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